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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5220 OF 2005

Mohan K. Dange ... Petitioner

Vs.

State of Maharashtra and Ors. ... Respondents

Mr. Rakesh Bhatkar for the petitioner.

Mr. M.H. Solkar, AGP. for respondent 1.

CORAM: SMT. RANJANA DESAI, J.

DATED: 21ST SEPTEMBER, 2005.

P.C.:-

1. Respondent 3 has filed Regular Civil Suit No.63 of 1997 in the Court of Civil Judge, Senior Division, Ratnagiri, for perpetual injunction restraining defendant 1 from interfering with his possession of the suit land. Respondent 2 is the 1st defendant therein. The petitioner is the 2nd defendant therein. Respondents 4 to 12 who are the brothers and sisters of the petitioner are defendants 4 to 11 in the said suit. They are supporting the petitioner.

2. It appears that in the said suit, it is the case of respondent 2 that he is the tenant of the suit land. He preferred an application in the said suit that the issue regarding tenancy be framed and may be referred to the tenancy court. By the impugned order, the trial court has framed the issue and referred it to the tenancy

court. Being aggrieved by this order, the petitioner has preferred this petition.

3. I have heard, at considerable length, the learned counsel for the petitioner. He submitted that the application filed by respondent 2 to refer the issue of tenancy to the tenancy court, is filed in order to delay the proceedings. Respondent 2 has merely alleged in the written statement that he is the tenant but there is no material in possession of respondent 2 to substantiate this averment. The learned counsel also referred to the judgment of this court in **Rama Hariba Khavale v. Gopika Ramling Survase and Ors., 2004 (2) B.C.R. 841**, where this court has held that a reference to tenancy court cannot be made for the asking. The court has to exercise its judicial mind to find out as to whether the plea is genuine or only aimed at protracting the proceedings. In the light of this judgment, contended the learned counsel, it must be said that the plea taken up by respondent 2 is not genuine. Hence, the trial court has erred in referring the issue to the tenancy court. The learned counsel also drew my attention to certain other proceedings, copies of which are annexed to this petition. These documents indicate that the mutation entries made in favour of respondent 2 were under challenge before the revenue authorities. The Collector by his order dated 31/5/2005 has held against respondent 2. The learned counsel, therefore, submitted that the impugned order deserves to be set aside.

4. In my opinion, the order passed by the trial court cannot be set aside. Admittedly, the suit is for perpetual injunction. The learned judge has rightly placed reliance on the judgment of the Full Bench of this court in **Bhagwantrao v. Ganpatrao, 1987 (3) BCR 258**, wherein this court has held that if in a suit simplicitor for permanent injunction a plea of tenancy is raised, the relief of permanent injunction cannot be granted unless that issue is referred to and decided by the tenancy court. Therefore, no illegality is committed by the trial court in referring the issue to the tenancy court. So far as other proceedings are concerned, it appears to me that they basically pertain to question of possession. Even the question of possession does not appear to have been considered by the revenue authorities on merit. The tenancy aspect has not been considered by the said authorities. In any case, if it is the case of respondent 2 that mutation entry indicates or, at any time, indicated that he was in possession that could be one of the factors relevant and indicative of tenancy and, hence, in such circumstances, if the issue as regards the tenancy is referred to the tenancy court, the trial court cannot be faulted. Hence, no interference is necessary with the impugned order. However, in the circumstances of the case, the tenancy court to whom the issue is referred, shall decide it as early as possible and, in any case, within a period of six months from the date of receipt of this order by it. The tenancy court

shall decide it independently as no opinion is expressed by me on the aspect of tenancy. The petitioner shall communicate this order to respondent 2 and other respondents. Petition is disposed of in the aforestated terms.

(SMT. RANJANA DESAI, J.)